MOHD. HATTA KAMISAN

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[SELANGOR CRIMINAL APPEAL NO. 101 OF 1983]
14 MARCH 1986

CRIMINAL LAW AND PROCEDURE: *Dangerous drugs - Trafficking cannabis - Section 39B(1)(a) of Dangerous Drugs Act 1952 - Duty of Judge at close of prosecution case - When should defence be called - Record of proceedings - Finding of facts and law - Whether inherently incredible.*

The accused and two others were charged with the offence of trafficking in dangerous drugs, to wit, 628.02 grammes of cannabis in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act"). Of the other two, one pleaded guilty and the other was acquitted at the close of the case for the prosecution. The President of the Sessions Court had at the close of the prosecution case, decided that there was *prima facie* evidence, which was not inherently incredible which established that the accused had been aware of the nature of the dangerous drug and having charge over it was keeping a dangerous drug. The essential element of trafficking as defined in s. 2 of the Act had been established and the President of the Sessions Court then called the accused to make his defence.

Counsel for the accused argued that the President erred in law as his decision to call upon the accused to make his defence was based on conjecture as there was no indication in his grounds of decision that he had relied on the accused's cautioned statement before doing so.

The accused in making his defence denied any knowledge of the cannabis and said that the bags containing the cannabis belonged to someone else. This denial was rejected by the President. Defence Counsel then argued that the President's rejection of this denial was based on the demeanour of the other person charged. The accused then appealed against the conviction.

Held:

[1] There is no merit in defence Counsel's argument that the President had erred in law as was contended.

[2] It would have been better for the President to have set down his finding of facts and law instead of merely stating that having heard in the prosecution's evidence he found the prosecution had adduced a *prima facie* case against the accused as charged. His failure to set down such finding has to be examined in the light of the proceedings.

[3] In the record of proceedings there is clear and unambiguous indication that the President had considered and relied on the accused's cautioned statement when he called upon the accused to make his defence and when he eventually found him guilty on the charge.

[4] The learned President in relation to the evidence of primary facts adduced by the prosecution must act on the presumptions.

(a) that all such evidence of primary facts is true unless it is inherently incredible that no reasonable person would accept it as being true and

(b) that there will be nothing to displace that inference as to further facts or to the state of mind of the accused which would reasonably be drawn from the primary facts in the absence of any further explanation." (see *A. Ragunathan v. Pendakwa Raya* [1982] 1 MLJ 139 at 141).

[5] The prosecution having adduced unchallenged primary facts as to the accused's relationship with the cannabis showing a case of trafficking, the facts not being inherently incredible, the President was bound to call upon the accused to make his defence on the charge. The President had weighed the total evidence and found no doubt cast on the case for the prosecution and there was no reason to interfere with that finding.

[Appeal against conviction dismissed.]

Cases referred to :
Haw Tua Tau v. Public Prosecutor [1981] CLJ (Rep) 11
A. Raghunathan v. Pendakwa Raya [1982] CLJ (Rep) 63

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37, 39B(1)(a)

For the appellant - Mohd. Yassin bin Ibrahim; M/s. Mohd. Akhir & Partners
For the public prosecutor - Ng Aik Guan (DPP)

JUDGMENT

KC Vohrah J:

The accused, Mohd. Hatta bin Kamisan, and two others, Idros bin Abd. Hamid and Mohd. Khairi bin Yahya, were charged with the offence of trafficking in a dangerous drug, to wit, 628.02 grammes of cannabis, in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952.

Mohd. Khairi pleaded guilty and Idros bin Abd. Hamid was acquitted at the close of the case for the prosecution.

Against the accused the case for the prosecution was that a police party had in the early hours of 25 September 1982 raided a house in the district of Rawang. The door of the house was opened by Mohd. Khairi who then led the police to the front room of the house where the accused was sleeping on the upper deck of a double-decker bed. The accused was awakened by the police and a search of the room was made in his presence and in the presence of Idros and Mohd. Khairi. Lying on the floor underneath of the double-decker bed were two bags. One bag, a big bag, contained one hundred and twenty-five rolls of cannabis, a pair of scissors, a weighing scale and several pieces of ready cut brown paper. The other bag contained cannabis seeds and several bundles of cannabis. The cannabis, falling within its defined meaning under s. 2 of the Dangerous Drugs Act 1952 before its amendment in 1983 by Act A553, weighed altogether 628.02 grammes. These facts were not disputed.

About twelve hours after his arrest the accused made a cautioned statement to a police Inspector. That it was freely and voluntarily made was not challenged. In his statement the accused stated that he had occupied the top deck while Mohd. Khairi occupied the lower deck of the double-decker bed. He said that the ganja (cannabis) found under the bed

belonged to two persons by the name of Amran and Mali. Questioned by the police Inspector as to why the ganja was found in the room which he and Mohd. Khairi were occupying, the accused replied, "The ganja was given to us by Amran on the 21 September 1982 morning so that we can do the packing of this loose ganja into kartus (rolls) for him." He further stated that "Amran will pay the three of us RM250 for one kati of ganja" and that they did the packing in the front room where Mohd. Khairi and he slept. When asked how many consignments of ganja he had received inclusive of the consignment he was arrested for, he said, "We have received only two consignments from Amran." He added, however, that he did not know who received the last consignment of ganja because he was not in the house at the time the ganja was brought to the house.

That the accused's cautioned statement was freely and voluntarily given, as earlier stated, was never challenged. It formed part of the case for the prosecution. Quite clearly, from the statement, the accused was aware that the consignment of cannabis found in the room by the police was cannabis although he denied ownership thereof. He and Mohd. Khairi had been given the consignment on 21 September 1982 in order that they could pack the ganja into rolls and it must follow that until they surrendered the packed ganja to the owners they had charge over that consignment of cannabis; on the day of the raid they were jointly **keeping** a dangerous drug.

The word "trafficking" has been defined under s. 2 of the Dangerous Drugs Act 1952 as follows:

> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, **keeping**, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug;

In so far as the accused is concerned (Mohd. Khairi had pleaded guilty), at the close of the case for the prosecution, without the aid of any of the presumptions under s. 37, there was *prima facie* evidence, which was not inherently incredible, establishing that he, albeit jointly with Mohd. Khairi, being aware of the nature of the dangerous drug and having charge over it was keeping a dangerous drug, cannabis, and the essential element of trafficking against him has been established. The learned President of the Sessions Court was bound to call the accused to make his defence which he did.

Encik Mohd. Yassin for the accused argued that the President erred in law as his decision to call upon the accused to make his defence was based on conjecture as there was no indication in his grounds of decision that he had relied on the accused's cautioned statement before doing so. To my mind this argument has no merit. It would have been better for the President to have set down his finding of facts and law instead of merely stating that having heard the prosecution's evidence he found the prosecution had adduced a *prima facie* case against the accused as charged. His failure to set down such finding has to be examined in the light of the rest of his grounds of decision and the record of proceedings. It is clear from the rest of his decision that when he considered the defence he had accepted the facts which I set out earlier in this judgment before he called upon the accused to make his defence. In the record of proceedings there is clear and unambiguous indication that he had considered and relied on the accused's cautioned statement when he called upon him to make his defence and when he eventually found him guilty on the charge.

I had earlier stated that the President was bound to call upon the accused to make his defence. It is salutary to recall the words of Lord Diplock in his judgment delivered in the Singapore case of *Haw Tua Tau v. Public Prosecutor* [1981] CLJ (Rep) 11. What he said and more have been set out with approval in the judgment of the Federal Court in *A. Ragunathan v. Pendakwa Raya* [1982] CLJ (Rep) 63. The learned President in relation to the evidence of primary facts adduced by the prosecution "must act on the presumptions (a) that all such evidence of primary facts is true unless it is inherently incredible that no reasonable person would accept it as being true; and (b) that there will be nothing to displace those inferences as to further facts or to the state of mind of the accused which would reasonably be drawn from the primary facts in the absence of any further explanation." To my mind the prosecution having adduced unchallenged primary facts as to the accused's relationship with the cannabis showing a case of trafficking, the facts not being inherently incredible, the learned President was bound to call upon the accused to make his defence on the charge.

The accused in making his defence denied any knowledge of the cannabis and said that the bags containing the cannabis belonged to Mohd. Khairi. He did not deny making his cautioned statement voluntarily but stated that when he said that the cannabis was brought to the house it was what Mohd. Khairi has told him. Mohd. Khairi in his evidence stated that the bags were his and that the accused did not know of the existence of the bags containing the cannabis. The learned President rejected the bare denial of the accused as to knowledge of the cannabis and found Mohd. Khairi not to be a witness of truth. This latter finding was attacked by Counsel for the accused on the ground that the President had relied on Mohd. Khairi's demeanour for rejecting him as a witness of truth. I am however satisfied that was not the sole ground that the President relied on. He relied on his evidence and weighed it against the total evidence that had been adduced in the case as he did in regard to the evidence of the accused. He found no doubt cast on the case for the prosecution and I can see no reason to interfere with that finding.

The appeal against conviction is dismissed.

Also found at [1986] 1 CLJ 436